In-Comix Food Industries Sdn Bhd v A Clouet & Co (KL) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-572-95
ABDUL AZIZ J
27 SEPTEMBER 1996

Civil Procedure *— Injunction — Interlocutory injunction to restrain publication of statements slandering goods and inducing breach of contract — Whether injunction should be granted — Whether there were triable issues*

Tort *— Defamation — Slander of goods — Elements of the tort*

Tort *— Inducement of breach of contract — Whether terms of the contract proved — Elements of the tort*

The defendants are manufacturers, producers and distributors of canned sardines under the trade mark 'Ayam Brand'. The plaintiffs are the exclusive local distributors of canned sardines which the plaintiffs first marketed in March 1995 under a trade mark in the form of a device of a circle enclosing the words 'Flying Man Brand' and the representation of a winged boy in flight ('the plaintiffs' trade mark'). The marketing of the sardines bearing the plaintiffs' trade mark was done in various parts of the country through retail outlets where the 'Ayam Brand' sardines also were on sale. The defendants were of the view that the get-up of the plaintiffs' sardine cans was confusingly and deceptively similar to the get-up of their sardine cans. After threatening the plaintiffs with legal proceedings, the defendants applied ex parte and obtained an order under s 16 of the Trade Descriptions Act 1972 ('the Act') in respect of the plaintiffs trade mark. After the order was obtained, the defendants' sales representatives went to various retail outlets where the plaintiffs' sardines were sold and made certain statements concerning the plaintiffs' sardines. The plaintiffs claimed that as a result of these statements the outlets have returned their stock or ceased placing orders for the plaintiffs' sardines or have ceased to sell the plaintiffs' sardines. The plaintiffs instituted action claiming damages and an injunction to restrain further publication of the statements and further acts of inducing breach of contract or interfering in contractual relationship. The plaintiffs' claims were based on two causes of action, namely (i) the tort of slander of goods or slander of title; and (ii) the tort of inducing breach of contract or interfering with contractual relationship with third parties. Pending trial, the plaintiffs applied inter partes for an interlocutory injunction in respect of publication of the statements.

Held, dismissing the plaintiffs' application and refusing to grant an interlocutory injunction:

(1) The statements published were based on the trade description order and they were either true or were published with just cause

or excuse and were therefore not malicious. As malice and falsehood were necessary to establish slander of goods or slander of title, there was therefore no triable issue for either tort in relation to those statements (see p 80C).

(2) In relation to inducement to commit a breach of contract or interference in contractual relationship, the plaintiffs must first prove the terms of the contract. Unless the terms of the contract were known, it could not be established that there was a breach (see p 80D–G).

Per curiam:

(1) A trade description order is a declaration that the infringing trade mark or get-up is for the purposes of the Act a false trade description in its application to the goods that are specified in the order. The declaration is for the purposes of the Act, which is a penal statute that belongs to the realm of criminal law (see p 76E).

(2) The person who qualifies to apply for a trade description order is a person who has an interest in a trade-mark or get-up. An interested person applies for a trade description order in order to move the machinery of criminal law to counter the infringement of his rights. The use of a trade description order is as conclusive proof that the infringing trade mark or get-up is a false trade description when applied to goods specified in the order. Its use is therefore for the purposes of the prosecution of offences under the Act (see p 76F–I).

[Bahasa Malaysia summary

Defendan adalah pembuat, penghasil dan pengedar sardin yang ditinkan di bawah tanda niaga 'Ayam Brand'. Plaintif adalah pengedar tempatan eksklusif sardin tin yang dipasarkan oleh plaintif mulai Mac 1995 di bawah tanda niaga dalam bentuk bulatan yang mengelilingi perkataan 'Flying Man Brand' dan representasi seorang budak bersayap yang sedang terbang ('tanda niaga plaintif'). Pemasaran sardin tersebut yang memperlihatkan tanda niaga plaintif telah dibuat di beberapa bahagian negara ini melalui kedai-kedai runcit di mana sardin 'Ayam Brand' juga telah dijual. Defendan telah berpendapat bahawa 'get-up' tin-tin sardin plaintif adalah hampir sama secara membingungkan dan memperdayakan dengan 'get-up' tin-tin sardin defendan. Setelah mengugut plaintif dengan prosiding undang-undang, defendan telah memohon ex parte dan telah mendapatkan suatu perintah di bawah s 16 Akta Perihal Dagangan 1972 ('Akta tersebut') berkenaan dengan tanda niaga plaintif. Setelah perintah itu didapati, wakil jualan defendan telah mengunjungi kedai-kedai runcit di mana sardin tin plaintif telah dijual dan telah membuat beberapa pernyataan berkenaan dengan sardin plaintif. Plaintif telah menuntut bahawa oleh sebab pernyataan-pernyataan tersebut, kedai-kedai runcit telah memulangkan stok ataupun telah berhenti membuat pesanan untuk sardin ataupun telah berhenti menjual sardin plaintif.

Plaintif telah memulakan tindakan menuntut ganti rugi dan injunksi untuk menahan penerbitan selanjutnya pernyataan-pernyataan tersebut dan tindakan selanjutnya yang mendorong pemungkiran kontrak ataupun mengganggu hubungan kontraktual. Tuntutan plaintif adalah berdasarkan dua kausa tindakan, iaitu (i) tort slander barang-barang ataupun slander titel; dan (ii) tort mendorong pemungkiran kontrak ataupun mengganggu hubungan kontraktual dengan pihak ketiga. Sementara menantikan perbicaraan, plaintif telah memohon inter partes untuk injunksi interlokutori berkenaan dengan penerbitan pernyataan-pernyataan tersebut.

Diputuskan, menolak permohonan plaintif dan tidak memberikan injunksi interlokutori:

(1) Pernyataan-pernyataan yang diterbitkan adalah berdasarkan perintah perihal dagangan dan ianya adalah sama ada benar ataupun telah diterbitkan dengan sebab yang wajar dan adil dan maka ianya telah diterbitkan tanpa niat jahat. Oleh kerana niat jahat atau kepalsuan adalah perlu untuk mendirikan slander barang-barang ataupun slander titel, maka tidak ada isu boleh bicara untuk mana-mana tort itu berkenaan dengan pernyataan tersebut (lihat ms 80C).

(2) Berkenaan dengan dorongan untuk melakukan pemungkiran kontrak ataupun gangguan hubungan kontraktual, plaintif mesti terlebih dahulu membuktikan terma-terma kontrak tersebut. Melainkan terma-terma kontrak itu diketahui, maka ianya tidak boleh dibuktikan bahawa terdapatnya suatu pemungkiran (lihat ms 80D–G).

Per curiam:

(1) Suatu perintah perihal dagangan adalah satu deklarasi bahawa tanda niaga ataupun 'get-up' yang melangggar hak lain adalah, untuk tujuan Akta tersebut, perihal dagangan yang palsu dalam pemakaiannya kepada barangan yang dinyatakan dalam perintah tersebut. Deklarasi itu adalah untuk tujuan Akta tersebut, yang merupakan statut jenayah yang termasuk dalam lingkungan undang-undang jenayah (lihat ms 76E).

(2) Orang yang layak memohon perintah perihal dagangan adalah seseorang yang mempunyai kepentingan dalam sesuatu tanda niaga ataupun 'get-up'. Orang yang berkepentingan akan memohon untuk perintah perihal dagangan untuk memulakan perjalanan undang-undang jenayah untuk menentang pelanggaran haknya. Penggunaan perintah perihal dagangan adalah sebagai bukti muktamad bahawa tanda niaga ataupun 'get-up' yang melanggar itu adalah perihal dagangan yang palsu bila dipakai kepada barang-barang yang disenaraikan dalam perintah tersebut. Maka kegunaannya adalah untuk tujuan pendakwaan kesalahan di bawah Akta tersebut (lihat ms 76F–I).

Notes

For a case on the elements of the tort of slander of goods, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 258.

For a case on application for interlocutory injunction generally, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1562.

Case referred to

Daily Mirror Newspapers Ltd v Gardner [1968] 2 All ER 164 (refd)

Legislation referred to

Rules of the High Court 1980 O 29

Trade Descriptions Act 1972 ss 3, 16, 26, 28, 28B

P Kandiah (*Lee Ong & Kandiah*) for the plaintiffs.

VC Kandan and *Stephen Jiew* (*Shearn Delamore & Co*) for the defendants.

Cur Adv Vult

Abdul Aziz J: The defendants are, and have been for many years, manufacturers, producers and distributors of canned sardines under the trade mark 'Ayam Brand'. The plaintiffs are the exclusive distributors in Malaysia of canned sardines manufactured by a Singapore company, which the plaintiffs first marketed in March 1995 under a trade mark in the form of the device of a circle enclosing the words 'Flying Man Brand' and the representation of a winged boy in flight ('the plaintiffs' trade mark'). The marketing was done in various parts of the country through retail outlets where the 'Ayam Brand' sardines also were on sale.

The defendants, being of the view that the get-up of the plaintiffs' sardine cans was confusingly and deceptively similar to the get-up of their sardine cans, and after threatening, through their solicitors, legal proceedings against the plaintiffs unless they ceased to trade in their sardines and being informed by the solicitors for the Singapore company that the Singapore company would defend the plaintiffs against any proceedings instituted against them, applied ex parte for, and obtained on 7 August 1995, a trade description order under s 16 of the Trade Descriptions Act 1972 ('the Act') in respect of the plaintiffs' trade mark.

Subsections (1), (2) and (3) of s 16 state as follows:

(1) Where any person being a proprietor or registered user of a registered trade mark within the meaning of any written law relating to trade marks or being otherwise entitled at law to the protection of a trade or other mark or a get-up for any goods or services established:

(a) in the case of a registered trade mark, that his rights in respect of such trade mark are being infringed in the course of trade within the meaning of the written law; or

(b) in the case of a trade or other mark or get-up for any goods or services, that his rights in respect of such trade or other mark or get-up are being infringed in the course of trade as a result of which he has a right of action for passing off,

A the High Court may on the application of such person make an order declaring that the infringing trade or other mark or get-up as the case may be is for purposes of this Act a false trade description in its application to such goods as may be specified in the order.

(2) An order of the High Court made under this section may be referred to as a trade description order.

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(3) A subsisting trade description order made by any High Court in Malaysia shall be admissible in evidence in any proceedings under this Act in which it is relevant as conclusive proof of a false trade description.

The essential and relevant part of the trade order made on 7 August 1995 is para 1, which declares as follows:

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1 Pengeluaran untuk jualan, pengimpotan, pembekalan, pengedaran, penawaran untuk jualan, penjualan atau lain-lain pengurusan secara dagang di Malaysia akan ikan mackerel atau sardin yang menggunakan tanda niaga yang mengandungi, inter alia, perkataan-perkataan 'Cap Anak Terbang' dan/atau 'Flying Man Brand' dan device seperti yang dengan lebih khususnya direpresentasikan dalam jadual di sini atau lain-lain caragaya yang adalah serupa secara keliru dan perdaya dianggap sebagai perbuatan menggunakan perihal dagangan palsu mengikut maksud Akta Perihal Dagangan 1972.

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After the order was obtained, the defendants' sales representatives went to various retail outlets where the plaintiffs' sardines were sold and made certain statements concerning the plaintiffs' sardines, as a result of which the plaintiffs claimed that the outlets have returned their stock of the plaintiffs' sardines to them, or have ceased placing orders for the plaintiffs' sardines or have ceased to sell the plaintiffs' sardines. I say 'after the order was obtained' because the plaintiffs say that the statements began to be made in August 1995 and, on the evidence available, the earliest actual statement was made on 26 August 1995.

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The plaintiffs' claims in this action, according to their counsel, are based on two causes of action, namely, the tort of slander of goods or slander of title and the tort of inducing breach of contract or interfering with contractual relationship with third parties. The claims hinge on the statements made to the retail outlets by the defendants' sales representatives. The plaintiffs claim damages and an injunction to restrain further publication of the statements and further acts of inducing breach of contract or interfering in contractual relationship.

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On 2 October 1995 an ex parte interlocutory injunction was granted in respect of publication of statements. By virtue of O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC 1980'), the ex parte injunction automatically lapsed on 16 October 1995. Therefore on 9 July 1996 the plaintiffs applied inter partes for an injunction in respect of publication of the statements. The defendants had earlier, on 20 December 1995, applied for the setting aside of the ex parte injunction of 2 October 1995 and for orders for investigation as to damages suffered by them and for security for damages. As the ex parte injunction had lapsed, learned counsel for the defendants conceded that it was no longer necessary to have it set aside. So what I have before me is essentially the plaintiffs' inter partes application

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for an interlocutory injunction in respect of publication of the statements. The question of damages and security for damages in respect of the ex parte injunction will be considered if the plaintiffs fail on their inter partes application.

It seems to me that the defendants' principal defence to the suit and to the application for the injunction is founded on the trade description order. Learned counsel for the defendants admitted as much when I asked him. Indeed, after looking at the affidavits, I am inclined to think that it was because they had the trade description order that they were emboldened to go to the various outlets and make the statements complained of.

According to sub-s (1) of s 16 of the Act, the subject-matter of a trade description order is a trade mark, some other mark or a get-up that is infringing. For the purposes of this judgment, I shall omit the 'some other mark'. A trade description order is a declaration that the infringing trade mark or get-up is for the purposes of the Act a false trade description in its application to the goods that are specified in the order. The declaration is for the purposes of the Act, which is a penal statute that belongs to the realm of criminal law.

The person who qualifies to apply for a trade description order is described in sub-s (1). As he has to have in a trade mark or get-up an interest such as is stated in that subsection, I shall, for convenience, call him 'the interested person'. In order to obtain a trade description order, he must establish the matters under paras (a) or (b) of sub-s (1). Under either paragraph, he must establish that his rights are being infringed. Under para (a), it is his rights in respect of his trade mark, if it is a registered trade mark. Under para (b), it is his rights in respect of his trade mark or get-up. Under para (b), he must also establish that as a result of the infringement he has a right of action for passing off. Those are civil matters belonging to the realm of trade mark law and the law of torts. The infringement has to be through the involvement of the infringing trade mark or get-up that is to be the subject-matter of the order sought.

An interested person applies for a trade description order in order to move the machinery of the criminal law to counter the infringement of his rights. The only use of a trade description order, as can be seen from sub-s (3), is as conclusive proof, in proceedings under the Act, that the infringing trade mark or get-up is a false trade description when applied to the goods specified in the order. Its use is, therefore, for the purposes of prosecution of offences under the Act in which it is relevant.

The main offence under the Act is in s 3. There are actually two offences there. I shall just take the offence under para (b) of sub-s (1), which is that of supplying or offering to supply any goods to which a false trade description is applied. Let us say that the subject-matter of a trade description order that the interested person has obtained is an infringing trade mark X and the goods specified in the order are goods A. If a retailer sells goods A to which trade mark X is applied, it may be that the retailer, in the absence of the trade description order, cannot be successfully prosecuted for the offence either because the trade mark X cannot be

shown to be a trade description as defined in s 4 or because, even if it can be shown to be a trade description, it cannot, as a trade description, be proved to be false as explained in s 5. The interested person may succeed, probably after prolonged litigation, in an infringement of trade mark action or a passing-off action against a retailer or the manufacturer of goods A arising from the use of the trade mark X by them. However whatever evidence that may be available to the interested person to succeed in that civil action need not necessarily be sufficient to constitute proof against the retailer of the offence of supplying goods to which a false trade description is applied. With a trade description order however, a successful prosecution against the retailer becomes possible. There is no need to show that trade mark X is a trade description under s 4 or that, as a trade description, it is false as explained in s 5. The trade description order itself has declared trade mark X to be a false trade description when applied to goods A, and sub-s (3) of s 16 provides that it is conclusive proof. The retailer stands hardly any chance of escaping conviction. Not only has the trade description order provided conclusive proof against him, it is also proof of something which, without the trade description order, may not even amount to an offence. The trade description order is therefore a formidable instrument in criminal law, and yet it is obtained through a civil process and, in many cases, as in this case, ex parte.

The Act is enforced by the enforcement division of the Ministry of Domestic Trade and Consumer Affairs through the Controller of Trade Descriptions and his deputies and assistants (see s 26(1) of the Act). They have powers to arrest, investigate and prosecute (s 28B of the Act) and to enter premises to seize and detain goods concerned in offences (s 28 of the Act).

The interested person who has obtained a trade description order will not have any use for it unless he goes to the enforcement division, lodges a complaint or report regarding the application of trade mark X to goods A and furnishes them with the trade description order. The officers of the division are obliged, and the interested person is entitled to expect them to investigate the complaint and seize goods A bearing trade mark X wherever they may be sold or offered for sale and prosecute their retailers. That is in fact what would happen if the officers are not too busy with other duties, have enough manpower at their disposal and have not succumbed to pleas to stay their hand in the event that there should be, as in this case, litigation between the manufacturer or distributor of the goods and the interested person, which actually is no legal bar to enforcement under the Act. The interested person is entitled to go round to retailers and tell them, as a matter of law, that it is an offence to sell goods A bearing trade mark X. That would be telling the truth. Since he is entitled to tell them that it is an offence, he is also entitled to tell them to keep the goods away or return them to the suppliers as that would be the only thing the retailers could rightly do if to sell the goods is an offence. He is also entitled to tell them that should they continue keeping the goods on sale, the enforcement officers are likely to come and seize the goods and prosecute them, as that is true and that is what should happen.

What I have said would apply as well if the subject-matter of the trade description order is an infringing get-up. A

I turn now to the trade description order made in this case. The infringing trade mark that is the subject-matter of the order is the plaintiffs' trade mark. The subject-matter is also extended to 'lain-lain caragaya yang adalah serupa...'. That is also a trade mark. The word 'caragaya' cannot mean a get-up because, get-ups and trade marks being different things, one cannot think of comparing a get-up to a trade mark to see whether it is 'serupa' to the trade mark. In any case, the extension is immaterial in this case. The fact is that the plaintiffs' trade mark is covered by the declaration in the order as the infringing trade mark. B C

Obviously the declaration in the order is worded differently from the way intended by sub-s (1) of s 16, but it must be construed to mean a declaration that the plaintiffs' trade mark is for the purposes of the Act a false trade description in its application to mackerels and sardines. The result is that it is an offence under s 3(1)(b) to supply or offer to supply mackerels or sardines to which the plaintiffs' trade mark is applied. Since the trade mark is applied to the plaintiffs' sardines, it is an offence to supply or offer to supply the plaintiffs' sardines. D

The question of the validity of the trade description order is not an issue in this case. There is the question of whether the defendants were justified in applying for the trade description order ex parte. There is the question of whether the learned judge was right in finding, as he must be presumed to have found, that the defendants had established the matters under paras (a) or (b) of sub-s (1). Those are not relevant questions in this case. The fact is that, unless and until it is set aside, the trade description order is in force and must be presumed to have been properly made and the defendants are entitled, as I have reasoned in the case of the interested person, to rely on it to say certain things to retailers of the plaintiffs' sardines. E F

I now turn to the statements that the defendants are alleged to have made. In their submissions both counsel agree that the following are the statements in the statement of claim, alleged to have been made: G

(a) That the 'Flying Man Brand' sardines are an infringement of the defendants' trade mark and are a copy of the defendants' 'Ayam Brand' sardines;

(b) That the defendants have obtained an order of court against the 'Flying Man Brand' sardines; H

(c) That enforcement officers from the Ministry of Domestic Trade and Consumer Affairs have raided retailers;

(d) That enforcement officers of the Ministry would conduct raids against the retailers at any time; and

(e) That the retailers should remove all 'Flying Man Brand' sardines from the selling area and should return them to the suppliers. I

There is no support for allegation (c). Neither in the particulars given in the statement of claim nor in any affidavit on the plaintiffs' side is there an averment that any one ever said that there had been raids. So I shall ignore allegation (c).

To found the tort of slander of goods or slander of title, the alleged statement must be a disparaging statement, that is, disparaging of the goods or the title. It is statement (a) that is the disparaging statement. Standing by themselves, the other statements can be regarded as disparaging, if at all, only by innuendo, but in the context of this case the innuendo can only be one that refers back to statement (a). Therefore the other statements do not add anything to the case for slander of title or slander of goods.

To have granted the trade description order the learned judge must have found under paras (a) or (b) of sub-s (1) of s 16 that the defendants' rights, whether in respect of their trade mark or get-up, were being infringed. I cannot imagine that he so found upon comparison of the plaintiffs' trade mark with that of the defendants because they are entirely dissimilar. He must have so found upon a comparison of the respective get-ups of the cans because there are in fact certain similar features between the get-ups. He must have found that the get-up of the plaintiffs' sardine cans was confusingly and deceptively similarly to the get-up of the defendants' sardine cans or, to put it as a layman would, was an imitation of the defendants' get-up. The case would have been one under para (b). He did not, however, specify the plaintiffs' get-up as the subject-matter of the trade description order, specifying instead the plaintiffs' trade mark, probably considering that specifying the trade mark would serve as well as specifying the get-up for the purpose of enforcement against the plaintiffs' sardines. In my opinion therefore, the trade description order gave just cause or excuse to the defendants for the making of statement (a).

As I have said, the other statements, standing on their own, are not disparaging or do not add anything to the disparaging effect of statement (a). Should I be wrong in that, I have to say as follows about each of the other statements.

As regards statement (b), it is true. The court order is the trade description order.

As regards statement (d), it is a true statement of the consequences that should follow the making of a trade description order. As I said, there would be no use in the defendants' getting the order if they did not follow up on it by moving the enforcement machinery. Even if the statement is not true as an actual fact in the sense that the defendants knew that the enforcement officers were actually coming, they had just cause or excuse for making the statement.

As regards statement (e), there is no question of it being either false or true, because it does not state a fact but only gives advice as to what should be done. An advice is still an advice even though it may be given urgingly or threateningly. The advice was given with just cause or excuse, and therefore without malice, as what was said should be done would be

the proper thing to do in view of the fact that, with the trade description order, the selling of the plaintiffs' sardines was an offence. A

Statements (a), (d) and (e) were published with just cause or excuse and therefore not maliciously. As malice is necessary for slander of goods or slander of title, there is no triable issue for either tort in relation to those statements. Statement (b) was true. As falsehood is necessary for the tort of slander of goods or slander of title, there is no triable issue for either tort in relation to that statement. B

As regards inducement to commit a breach of contract or interference in contractual relationship, the statement of claim alleges the defendants to have done three kinds of things, namely, causing the retailers to refrain from buying 'Flying Man Brand' sardines, causing them to return the sardines to the plaintiffs and causing them to unlawfully terminate their sales contracts with the plaintiffs. I think the third act is merely a statement of the effect of the other two acts. C

The plaintiffs have not shown what their contract was with the retailers. Unless the terms of the contract are shown, the plaintiffs cannot prove that the retailers are bound by contract to buy sardines from them. Was there, for instance, a running contract between the retailers and the plaintiffs as there was in *Daily Mirror Newspapers, Ltd v Gardner* [1968] 2 All ER 164?. The plaintiffs must show that there was a contract under which the retailers were bound to buy or to continue buying Flying Man Brand sardines from them, otherwise there is no case of interfering with contract or inducing breach of contract. That is as far as the first allegation is concerned. As far as the allegation of causing the retailers to return the sardines is concerned, again the plaintiffs must show what the contract was in order to show that it was a breach of contract to return the sardines. That is because, unless the terms of the contract are known, it cannot be established that the return of the sardines was a breach of contract. It may not be a breach of contract at all. There are invoices from which it can be inferred that the plaintiffs sold their sardines to retailers on credit, the credit term being 60 days. There could be a term to be implied from trade practice that should the retailers be unable to sell by reason of any defect in the goods or any legal impediment, they may return them within a certain period and they need not pay for them or the plaintiffs would pay back any amount already paid for them. I appreciate that there would not have been a formal written contract, but what the plaintiffs contend to be the contractual understanding with the retailers must be averred, or they will have failed not only to prove interference in contractual relationship or inducement to commit a breach of contract, but even to disclose a cause of action. D E F G H

Furthermore, whatever may have been the consequences of the defendants' statements, they had, as I have found, lawful justification for making those statements, and the action cannot lie against them. I

For those reasons I think there is no triable issue as regards the claim relating to contract.

A The interlocutory injunctions sought by the plaintiffs are to restrain the future publication by the defendants of statements that the 'Flying Man Brand' sardines would be confiscated by the authorities, statements concerning the plaintiffs' right to manufacture or sell 'Flying Man Brand' sardines, statements that retailers should not deal with the 'Flying Man Brand' sardines and should return them to the suppliers, and statements B that the premises of the retailers would be raided by the authorities.

Even without considering whether or not there is a triable issue in the plaintiffs' claim arising from the statements that the defendants actually published, I would not grant the injunctions sought. That is because, as I have said, the existence of the trade description order provides justification C to the defendants to make such statements. If the enforcement division have not moved against the retailers, that may be because of the uncertainty created in their mind by the present dispute, but they could, notwithstanding the dispute, have proceeded, with legal justification, to set in motion the machinery of investigation, seizure and prosecution. They could have D seized the 'Flying Man Brand' sardines and prosecuted the retailers. Or they would be planning to do so, and would actually be doing so, in the near future. It would be a mockery if today the defendants were restrained for the future from publishing the relevant statements, which if published and heeded would save the 'Flying Man Brand' sardines from seizure and forfeiture and the retailers and the plaintiffs from prosecution, and yet, E while they are so restrained, the authorities were actually to come and seize the sardines and prosecute the retailers and the plaintiffs. By the trade description order, which I say again is a formidable instrument, it becomes an offence to supply 'Flying Man Brand' sardines, and any person may tell retailers to stop dealing in them and threaten to have the authorities act against them and the goods if they do not discontinue dealing in them. F The defendants ought not to be stopped from doing what others have a right to do just because they have a personal interest in the matter. What the plaintiffs need to do to prevent the defendants making such statements is to endeavour to have the trade description order set aside. As long as it is in force, the defendants ought not to be restrained from publishing such G statements.

For those reasons I dismiss the plaintiffs' application with costs.

Application dismissed.

Reported by T Vimalavathy

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